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Developing a Unified European Environmental Law and Policy

*Cynthia B. Schultz**
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INTRODUCTION

With the democratization of Central and Eastern Europe, the establishment of a common market in the European Community (EC or Community), and the creation of pan-European organizations such as the European Economic Space,¹ a geographic realignment of Europe is emerging. This realignment is uniting European nations by establishing a common front for pursuing social, economic, and political activities. As Europe unites, environmental protection is emerging as a pervasive social issue which will be at the forefront of future European political and economic policy-making.

This Article addresses the development of a unified European environmental law and policy that incorporates EC environmental law as its base structure. Part I provides a brief overview of EC environmental law and policy. Part II then traces the expansion of EC environmental law and policy throughout Europe. Part III describes the new institutions, agreements, and mechanisms implemented by the EC to unify environmental protection throughout the continent. Part IV examines the prospects of developing a successfully unified European environmental law and policy. This Article concludes that, while trade and foreign investment are the primary issues of concern among the nations

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¹ Sobell, *The CEMA in a Changing Global Climate*, RAD Background Report/65 (East-West Relations), RADIO FREE EUROPE REPORT, Apr. 13, 1989, at 1.

of Europe, failure to immediately unify their environmental laws and policies will impede true European integration.

I. AN OVERVIEW OF EC ENVIRONMENTAL LAW AND POLICY

The existence of three separate European regional groups—the EC,² the European Free Trade Association (EFTA),³ and the Central and Eastern European nations⁴—has created great disparity in environmental policy- and law-making throughout the European continent.⁵ Of the three groups, the EC is the only organization to confront environmental affairs on a regional scale. EFTA and Central and Eastern European nations leave environmental protection efforts to national jurisdiction and provide little guidance regarding environmental protection on a regional scale.⁶

² Member states of the European Community include the United Kingdom, France, Germany, Italy, Netherlands, Belgium, Luxembourg, Denmark, Ireland, Greece, Spain, and Portugal.

³ The member nations of the European Free Trade Association (EFTA) include Austria, Finland, Iceland, Norway, Sweden, and Switzerland. EFTA was established in 1960 as a free trade zone and allows member states full retention of their decision-making authority. Convention Establishing the European Free Trade Association, Jan. 4, 1960, 370 U.N.T.S. 3.

⁴ See Schultz & Crockett, *Economic Development, Democratization, and Environmental Protection in Eastern Europe*, 18 B.C. ENVTL. AFF. L. REV. 53, 60–71 (1990). The countries of Central and Eastern Europe include Bulgaria, Czechoslovakia, Hungary, Poland, Romania, and Yugoslavia. With the exception of Yugoslavia, these nations are members of the Council of Economic Mutual Assistance (COMECON) (also known as CEMA or CMEA). As of March 1991, however, COMECON is in the process of dissolution. Robinson, *Winding-Up of COMECON Delayed*, Fin. Times, Mar. 16–17, 1991, at 2, col. 7. See generally Notzöld, *Several European Economic Blocs? The Future Significance of the COMECON*, 40 AUSSENPOLITIK 277, 278 (1989); Dettman, *Closing the Book*, Horizont [in German], May 28, 1990, at 50–51, trans. in JOINT PUBLICATION RESEARCH SERVICE—EASTERN EUROPE, July 3, 1990, at 11–12. Formal dissolution of COMECON is expected by late summer of 1991. Central and Eastern European countries are beginning negotiations to discuss the creation of a new organization, to be named the Organization for International Economic Cooperation.

⁵ See generally Timoshenko, *International Legal Problems of Environmental Protection in the European Region*, 4 CONN. J. INT'L L. 441 (1989).

⁶ The member states of COMECON have virtually ignored environmental policy and law for over three decades. In fact, only in 1989 did COMECON first create the CEMA Permanent Commission for Cooperation in Environmental Protection to coordinate environmental policies. *Official Outlines CEMA Environmental Priorities*, Sovetskaya Latvija [in Russian], June 13, 1989, at 3, trans. in JOINT PUBLICATION RESEARCH SERVICE—SOVIET UNION, July 20, 1989, at 40 [hereinafter *CEMA Environmental Priorities*]. Director Kaminski of CEMA's Department of Environmental Protection intends to make the environment a major topic at future COMECON meetings. To improve environmental protection, Mr. Kaminski is focusing attention on "specific funds, technologies, equipment, [and] changes

The role of the EC has expanded beyond its original economic and trade mandates and now includes provisions for the integration of environmental protection.⁷ The EC first began to address environmental issues in 1973, when it passed the first of four environmental action programmes.⁸ It was not until 1985, however, that the Single European Act (SEA) incorporated Title VII, titled Environment, into the EEC Treaty.⁹ Title VII clearly estab-

in the integration links and structures, including those with the EC countries, as well as with other industrially developed states." *Id.*

CEMA also has a Permanent Commission for Electrical Energy and the Nuclear Power Industry, which has avowed to continue its activities regardless of the fate of CEMA. *An Energy Policy Even Without CEMA*, Lodive Noviny [in Czech], June 9, 1990, at 2, *trans. in* FOREIGN BROADCAST INFORMATION SERVICE—EEU (Eastern Europe), June 19, 1990, at 2. The Permanent Commission has opened participation to other European states. One of its purposes is to focus on the environmental aspects of electrical energy.

⁷ Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, at arts. 130r–130t [hereinafter EEC Treaty].

⁸ Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting within the Council on the programme of action of the European Communities on the environment (1973–1977), O.J. C112/1 (1973) [hereinafter First Environmental Action Program].

The EC's Environmental Action Programs are comprehensive strategies that provide a basis for Community involvement in environmental matters. *See id.*; Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting within the Council on the continuation and implementation of a European Community policy and action programme on the environment (1977–1981), O.J. C139/1 (1977) [hereinafter Second Environmental Action Program]; Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting within the Council on the continuation and implementation of a European Community policy and action programme on the environment (1982–1986), O.J. C46/1 (1983) [hereinafter Third Environmental Action Program]; Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting within the Council on the continuation and implementation of a European Community policy and action programme on the environment (1987–1992), O.J. L289/3 (1987) [hereinafter Fourth Environmental Action Program]. *See also* Vandermeersch, *The Single European Act and the Environmental Policy of the European Economic Community*, 12 EUR. L. REV. 407, 407–29 (1987). The Environmental Action Programs are promulgated in the form of declarations or resolutions, which are nonbinding on member states, and only provide an indication of what legislative actions the Commission should consider.

⁹ Single European Act, Feb. 17, 1986, O.J. L169/1 (1987) [hereinafter SEA]. Articles 100A, and 130r–130t of the EEC Treaty incorporate environmental protection into Community law and policy. EEC Treaty, *supra* note 7, at arts. 100A, 130r–130t. *See generally* Krämer, *The Single European Act and Environment Protection: Reflections on Several New Provisions in Community Law*, 24 COMM. MKT. L. REV. 659 (1987). Title VII establishes environmental protection as a Community policy, requiring the Community and member states to coordinate certain aspects of environmental policy, while simultaneously allowing member states to pursue their own national environmental policies, goals, and preferences. EEC Treaty, *supra* note 7, at Title VII; Commentary of the European Council of Environmental Law, *The Environment in the Treaty Creating the European Economic Community*

lishes the Community's authority to initiate environmental law- and policy-making activities, signifies the EC's commitment to environmental protection, and reaffirms the Community's right to pursue a cohesive environmental policy.¹⁰

The new environmental provisions delineated under articles 100A and 130r-130t of the EEC Treaty establish environmental protection as a Community priority and require the EC member states to take action to protect environmental quality within their domestic jurisdictions.¹¹ Thus, the Community and the member states share responsibility for environmental protection.¹² Article 130r(4) provides that, based solely on the nature of the issue, the Community should address some environmental protection issues, while others should be left to the member states. These new environmental provisions have prompted the EC to pursue a stronger, more consolidated environmental policy.¹³

II. THE INFLUENCE OF EC ENVIRONMENTAL LAW AND POLICY THROUGHOUT EUROPE

Until recently, the EC and EFTA member nations have interacted with one another more than they have interacted with the Central and Eastern European nations.¹⁴ Central and Eastern European nations have historically focused most of their trade relations on the Soviet Union. The opening of Central and Eastern Europe in 1989, however, has turned the attention of many of these nations away from the Soviet Union and toward Western Europe.¹⁵

The interest in a united Europe has spurred the national governments of various European countries to create a common European economic market and to encourage political stability

as Modified by the Single European Act, in ENVIRONMENTAL LAW OF THE EUROPEAN COMMUNITIES 10, 732E (W. Burhenne ed. 1990) [hereinafter ENVIRONMENTAL LAW OF THE EUROPEAN COMMUNITIES].

¹⁰ See generally E. REHBINDER & R. STEWART, ENVIRONMENTAL PROTECTION POLICY (1985) (development of Community environmental policy); Haigh, *The Environmental Policy of the European Community and 1992*, 12 Int'l Env't Rep. (BNA) 617 (Dec. 13, 1989) (brief overview of EC environmental policy).

¹¹ ENVIRONMENTAL LAW OF THE EUROPEAN COMMUNITIES, *supra* note 9, at 10, 732E.

¹² EEC Treaty, *supra* note 7, at art. 130r.

¹³ See Krämer, *supra* note 9, at 668-73 (discussing Community environmental policy under the SEA).

¹⁴ Notzöld, *supra* note 4, at 287.

¹⁵ See generally *supra* note 4.

and environmental protection throughout the European continent.¹⁶ As the 1992 deadline for EC integration draws near, the nations of Europe are exploring the possibility of creating a new economic "territorial space"¹⁷ and of expanding the EC.¹⁸ The nations of Central and Eastern Europe, however, face the difficulty of developing democratic systems and converting their economies into capital markets. These changes require significant reformation of economic, legal, and environmental institutions. While European free trade and foreign investment are the primary areas of focus, concern for environmental protection is significantly increasing.

Partially by default, and partially due to its successes in uniting its twelve member states, the EC is emerging as the model structure for uniting Europe and creating a federation of states de-

¹⁶ See generally W. WALLACE, *THE TRANSFORMATION OF WESTERN EUROPE* (1990); J. ROLLO, *THE NEW EASTERN EUROPE: WESTERN RESPONSES* (1990).

¹⁷ EFTA BULL. (Oct. 1989–Mar. 1990), at 5–6 (Joint Declaration of the December 19, 1989 meeting of EFTA and EC countries discussing the creation of a European Economic Space) [hereinafter Joint Declaration on the EES].

¹⁸ Several EFTA and Eastern European states have expressed interest in joining the EC. Article 237 of the EEC Treaty states that "[a]ny European state may apply to become a member of the European Economic Community." EEC Treaty, *supra* note 7, at art. 237. The process of accession as a member state to the EC, however, is lengthy and cumbersome. See generally Horovitz, *EC-Central/East European Relations: New Principles for a New Era*, 27 COMM. MKT. L. REV. 259 (1990) (analyzing current bilateral economic cooperation agreements between Eastern Europe and the EC and the probability of a future accession agreement between Eastern European countries and the EC); Note, *Return to Europe: Integrating Eastern European Economics into the European Market Through Alliance with the European Community*, 31 HARV. INT'L L.J. 660, 668–90 (1990) (discussing mutual advantages for the EC and Eastern European countries in entering accession agreements) [hereinafter *Return to Europe*]; deKieffer, *European Community/Hungary Relations*, 21 CASE W. RES. J. INT'L L. 55 (1989). See also Gyorgy, *Antall on Relations with Germany, NATO, Common Market, Warsaw Pact*, Nepszabadsag [in Hungarian], June 18, 1990, at 3, *trans. in* JOINT PUBLICATION RESEARCH SERVICE—EASTERN EUROPE, July 13, 1990, at 6 (stating Hungary's intention to strengthen ties with both the EC and EFTA while seeking accession to the EC within the next decade); Lazar, *Vast Majority Favors Joining Common Market*, Nepszabadsag [in Hungarian], Mar. 31, 1990, at 4, *trans. in* JOINT PUBLICATION RESEARCH SERVICE—EASTERN EUROPE, Apr. 27, 1990, at 1 (discussing a poll taken in Hungary, the results of which were overwhelmingly in favor of Hungarian membership in the EC). But see *Labour Set to Take Over in Norway*, Fin. Times, Oct. 30, 1990, at 18, col. 1 (noting that dissension exists between political parties in Norway over the issue of EC membership). Ms. Gro Brundtland, Labour party leader and outspoken advocate for the environment, stated that Norway would probably accede to the EC before Sweden. Austria has already applied for accession to the EC, and Sweden announced its intent in October 1990 to seek accession. Buchan & Taylor, *EFTA Comes Closer to Setting Out Its European Stall*, Fin. Times, Nov. 21, 1990, at 3, col. 3. See generally Note, *Counterpoint: Austria's Application for Membership in the European Community and Delors' Call for a New EC-EFTA Relationship*, 20 GA. J. INT'L & COMP. L. 241 (1990).

voted to environmental, political, economic, legal, and social integration.¹⁹ Of the two currently existing European regional organizations—the EC and EFTA—the EC is the only organization with a mature supranational structure²⁰ capable of bringing the diverse European nations together.

The EC's role in uniting Europe, however, is not clearly defined. The EC, therefore, has decided to strengthen its economic and political ties to non-EC nations.²¹ For example, the EC has pursued negotiation of a Joint Declaration with the Council of Economic Mutual Assistance (COMECON) trading bloc,²² and

¹⁹ See generally Preece, *The European Economic Community—International Organization or Federal State*, 14 UNIV. QUEENSLAND L.J. 78 (1990); Donde, *Address: Europe Towards the Year 2000 Seen in a Danish Perspective*, 13 FORDHAM INT'L L.J. 405 (1989–90). Leif Donde, Danish Counsel General, advocates the EC as the vehicle for total European integration.

²⁰ Supranational bodies have been defined as having "the power to take decisions directly binding upon individuals, institutions, and enterprises, as well as upon the governments of the States in which they are situated, and which they must carry out notwithstanding the wishes of such governments." Preece, *supra* note 19, at 79, citing STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 493 (6th ed. 1967). The EC's authority can be viewed as governmental in nature. *Id.* at 86. Its current structure provides for executive, legislative, and judicial functions. One author has argued that the Commission acts as the executive branch, the Parliament as the lower house of a parliament, the Council of Ministers as the upper house of a parliament, and the Court of Justice as the judicial branch. *Id.* at 86.

²¹ The EC, for example, has increased its role as an international actor. In the area of external relations, the Community has the authority to negotiate treaties and association and economic cooperation agreements with foreign countries and international organizations on commercial and environmental issues. EEC Treaty, *supra* note 7, at arts. 130r, 228, 238. See also Note, *A Community Within the Community: Prospects for Foreign Policy Integration in the European Community*, 103 HARV. L. REV. 1066 (1990).

²² On June 25, 1988, the Commission of the European Communities (Commission) entered into a Joint Declaration on the principles and scope of cooperation with the COMECON countries. Decision 88/345, Council Decision on the Conclusion of the Joint Declaration on the Establishment of Official Relations Between the European Economic Community and the Council for Mutual Economic Assistance, O.J. L157/35 (1988). For a discussion of the legal nature of the Joint Declaration and the obligations arising under it, see Lysén, *The Joint Declaration by the EEC and the CMEA*, 14 N.C.J. INT'L L. & COMM. REG. 369, 372 (1989). This declaration bars EC member states from negotiating individually with COMECON countries on matters of commercial policy. The importance of the Joint Declaration lies in the initial approach to establishing normal relations between the two regional organizations. See generally Nello, *Some Recent Developments in EC-East European Economic Relations*, 24 J. WORLD TRADE L. 5 (1990) (significance of Joint Declaration and bilateral agreements between COMECON and EC countries). The Joint Declaration authorizes the EC to negotiate agreements with individual Central and Eastern European countries over tariff rates, import quotas, and other state-imposed restrictions on trade. See Decision 88/345, *supra*, at 34. See generally W. WALLACE, *supra* note 16, at 53–107; Kennedy & Webb, *Integration: Eastern Europe and the European Economic Communities*, 28 COL. J. TRANSNAT'L L. 633, 635 (1990); Gryzbowski, *The Council for Mutual Economic Assistance and the European Community*, 84 AM. J. INT'L L. 284 (1990); Hanson & Sobell,

bilateral economic cooperation agreements with the EFTA member nations²³ and several Central and Eastern European nations.²⁴ These preliminary agreements have taken various forms and are legally binding. They do not, however, assure non-EC signatories a preference for or guaranty of membership in the EC.²⁵

The EC is interested in expanding its role throughout the European continent, but has found achievement of this goal to be arduous. As an interim solution to granting full EC accession, the Community is pursuing two alternatives: creation of the European Economic Space (EES, also commonly referred to as European Economic Area)²⁶ and negotiation of individual agreements with non-EC European nations, many of which include environmental provisions.

A. *Creation of the EES*

The concept of the EES was first announced on December 19, 1989, in an EC-EFTA Joint Declaration calling for formal nego-

The Changing Relations Between the EC and the CEMA, RAD Background Report/73 (East-West Relations), RADIO FREE EUROPE REPORT, May 3, 1989, at 1.

²³ EFTA does not have the power to enter into trade agreements on behalf of its member nations. The EC, therefore, has developed individual trade agreements with each individual country. See Council Regulation 2836/72, *as amended*, O.J. L300/1 (1972) (EC-Austria Agreement); Council Regulation 2838/72, *as amended*, O.J. L300/96 (1972) (EC-Sweden Agreement); Council Regulation 2840/72, *as amended*, O.J. L300/188 (1972) (EC-Switzerland Agreement); Council Regulation 2842/72, O.J. L301/1 (1972) (EC-Iceland Agreement); Council Regulation 1691/73, O.J. L171/1 (1973) (EC-Norway Agreement); Council Regulation 3177/73, *as amended*, O.J. L328/1 (1973) (EC-Finland).

²⁴ See generally Grzybowski, *supra* note 22. The EC signed trade and economic agreements with Bulgaria in 1980, Hungary in September 1988, Czechoslovakia in December 1988, and Poland in September 1989. See Council Regulation 3338/80, O.J. L352/1 (1980) (EC-Romania Agreement); Council Decision 89/593, O.J. L327/1 (1988) (EC-Hungary Agreement, including a provision for economic cooperation in fields of energy and environment); Council Decision 89/215, O.J. L88/1 (1989) (EC-Czechoslovakia Agreement); Council Decision 89/593, O.J. L339/1 (1989) (EC-Poland Agreement). These agreements provided most-favored-nation status in trade, preferential customs tariffs, and the abolition of quantitative restrictions on import of "sensitive" products. Mikhailin, *New Opportunities for CEMA and EC Relations*, TASS, Dec. 14, 1989 (NEXIS, Current file).

Eastern European countries will not be able to enter into association agreements establishing free trade areas until their respective governments have established market economies. The Joint Declaration and individual bilateral economic cooperation agreements with several of the Eastern European countries can be viewed, at most, as an initial step toward association with the EC. See Kennedy & Webb, *supra* note 22, at 653.

²⁵ Kennedy & Webb, *supra* note 22, at 654. Indeed, the association agreements between Central and Eastern European countries and the EC have been characterized as "simply the architectural title given by the EC to its future initiatives with respect to Eastern Europe." *Id.*

²⁶ See generally Joint Declaration on the EES, *supra* note 17.

tiations to establish the EES. The EES is currently an agreement between the EC and EFTA, but admission may be extended to Central and Eastern European nations.²⁷ This entity, created as a function of economic necessity and cultural reality,²⁸ requires EFTA nations to implement the harmonization directives proposed to effectuate 1992 EC integration. In addition, the EES agreement calls for the creation of a process in which the EES would provide administrative, legislative, and judicial forums for all member nations.²⁹ The EES also requires that the EFTA nations adopt the five freedoms of the EC—free movement of goods, services, capital, labor, and the right of establishment.³⁰

The EC, EFTA, and some Central and Eastern European nations³¹ view the EES as an interim solution for European integration before their full accession to the EC is completed.³² Furthermore, the EES allows the EC to postpone consideration of applications for accession in favor of focusing on the 1992 integration deadline. Thus, this interim strategy allows the EC to pursue its immediate goals of integration free from the pressures

²⁷ See generally Kostrzewa & Schmieding, *EFTA Option for the Reform States of Eastern Europe*, 12 THE WORLD ECONOMY 501 (1989). EFTA has encouraged cooperation and association with the Central and Eastern European countries. See Joint Declaration on EES, *supra* note 17, at 4; *Return to Europe*, *supra* note 18, at 661, 664–65. Hungary, Poland, and Czechoslovakia, however, have declined membership in EFTA and rather have sought to enter into free trade agreements with EFTA countries. *East European States Say "No Thanks," Svenska Dagbladet* [in Swedish], June 14, 1990, *trans. in* FOREIGN BROADCAST INFORMATION SERVICE, DAILY REPORT: EASTERN EUROPE, June 19, 1990, at 2.

²⁸ See Lugon, *You, Them, Us: The Protagonists of Europe . . .*, EFTA BULL. (Oct. 1989–Mar. 1990), at 20–25 (discussing European cultural identity, linkage, and barriers). The heads of government of EFTA declared that the basis for their cooperation with the EC could be found in Europe's "common cultural heritage, adherence to the fundamental values of democracy and human rights, geographical proximity and a high degree of interdependence in the fields of industry, trade and technological development." *Declaration of EFTA Heads of Government*, at para. 3 (Oslo, Norway, Mar. 15, 1989).

²⁹ See generally Editorial Comment, *EC-EFTA Court?*, 26 COMM. MKT. L. REV. 341 (1989) (discussing options for the establishment of a European court that would include representation of all European countries).

³⁰ EEC Treaty, *supra* note 7, at arts. 3, 8–10, 18, 30–36, 48–50, 52–57, and 59–63. For a discussion of the EES by EFTA ministers, see Joint Declaration on EES, *supra* note 17, at 1–14.

³¹ See, e.g., *Possibility of Integration into EC Discussed*, Ekonomska Politika [in Serbo-Croatian], May 14, 1990, at 22–24, *trans. in* JOINT PUBLICATION RESEARCH SERVICE—EASTERN EUROPE, June 29, 1990, at 37–40 (interview with Giorgio Rosetti, member of the European Parliament). Yugoslavia applied for membership in EFTA with the goal of eventual membership in the EC.

³² See Buchan & Taylor, *supra* note 18, at 3.

associated with the creation of a European-wide economic, social, political, and legal entity.³³

The lack of an official institutional framework or structure in the EES, however, will impede its overall effectiveness. Nevertheless, the EFTA and EC member states share a common interest in establishing decision-making institutions capable of dealing immediately and effectively with the outstanding issues associated with a unified European environmental law and policy.³⁴ Initially, Central and Eastern European nations would benefit from joining an organized EES³⁵ because they could negotiate for access to some of the opportunities already afforded the EFTA nations, such as equal participation in the EC's research and development programs,³⁶ coordination of environmental protection efforts, and harmonization of technical standards.³⁷ Thus, despite its structural infirmities, the EES may prove to be, at least for the interim period, the institutional mechanism for preparing European environmental integration.

B. *Negotiation of Individual Agreements*

Concurrent in their efforts to create the EES, EFTA and Central and Eastern European nations will probably enter into association agreements with the EC.³⁸ Negotiating an association agreement is difficult because the EEC Treaty does not provide clear direction in this regard.³⁹ In fact, as a result of overwhelming interest in full accession to the EC, the Commission of the European Communities (Commission) has decided to draft a new proposal that would more clearly define the law of accession to

³³ See *supra* note 19 and accompanying text.

³⁴ See Joint Declaration on EES, *supra* note 17, at 3-4 (providing the text of the ministerial communique, which reflects the common EFTA position on the creation of a European Economic Space).

³⁵ But see Horowitz, *supra* note 18, at 282-83 (noting that premature Eastern European membership in the EES may be "regrettable and counterproductive").

³⁶ See *infra* notes 47-50 and accompanying text (discussing EC research programs).

³⁷ Buchan & Taylor, *supra* note 18, at 3. EFTA countries currently participate in organizations such as the European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (CENELEC). These organizations are responsible for drafting and setting EC testing and certification requirements. Eastern European countries should at least be granted observer status to these organizations.

³⁸ See *supra* notes 23-24 and accompanying text.

³⁹ For an example of environmental implications and problems in an accession agreement with the EC, see generally Lang, *Implications of the European Community's Environment Policy for Turkey*, 13 EUR. L. REV. 403 (1989).

the EC.⁴⁰ These "third-generation association agreements" will address more than just trade issues—they will also focus heavily on protection of the human environment and scientific research and development.⁴¹ Utilizing these association agreements, the EC should pledge to make its environmental programs and agenda available to nations seeking association.

As the EES gradually develops and the association agreements are redefined, the EC should take the immediate step of negotiating protocols to existing bilateral economic cooperation agreements. The bilateral economic cooperation agreements that currently exist between the EC, EFTA, and Central and Eastern European nations do not adequately address environmental concerns. Therefore, it would seem appropriate for the EC to adopt protocols to these agreements to provide financial and environmental development assistance as well as to promote harmonization of environmental policies.⁴²

III. EXPANDING EC ENVIRONMENTAL LAW AND POLICY THROUGHOUT EUROPE

In attempting to centralize environmental policy, the EC has expressed an interest in extending its environmental controls to non-EC nations.⁴³ To achieve this goal, the Community has undertaken at least two notable steps. First, the EC has initiated expansion of its environmental law and policy. For example, the EC has offered membership to non-EC nations in its newly-created European Environment Agency (EEA), which is designed to gather and access European environmental information.⁴⁴ Ex-

⁴⁰ *Possibility of Integration into the EC Discussed*, JOINT PUBLICATION RESEARCH SERVICE—EASTERN EUROPE, June 29, 1990, at 38.

⁴¹ *Id.* See also Horovitz, *supra* note 18, at 267–82 (defining "first generation" and "second generation" agreements).

⁴² *Cf.* Horovitz, *supra* note 18, at 277 (discussing the use of protocols for other EC agreements, which allowed for additional cooperation in areas of industrial and scientific matters).

⁴³ On December 18, 1989, the Soviet Union and COMECON signed an Agreement on Trade and Commercial and Economic Cooperation in Brussels, Belgium. The Agreement establishes joint activities between COMECON member nations and the EC in environmental areas and declares environmental protection to be the first area of cooperation in Europe. *CEMA Deputy Secretary on Brussels Meeting*, TASS, Nov. 30, 1989 (NEXIS, Current file).

⁴⁴ Regulation 1210/90, Council Regulation on the Establishment of the European Environment Agency and the European environment information and observation network, O.J. L120/1 (1990) [hereinafter EEA Regulation]. Article 19 provides: "The Agency

pansion of the EEA would facilitate European-wide administration of essential EC environmental law and policy, access to environmental information, and completion of environmental impact assessments. Second, the EC has actively supported the creation and funding of a multinational development bank, which is responsible for funding Central and Eastern European development, with an eye toward environmental protection and restoration.

A. *Gathering and Accessing European Environmental Information: European Environment Agency*

Unlike the U.S. Environmental Protection Agency (EPA), the EEA is primarily designed to verify and coordinate member states' environmental standards.⁴⁵ Although the exact role of the EEA is still uncertain,⁴⁶ the Community has asserted that the EEA will be largely responsible for the EC's environmental research activities, coordination of the environmental information programs of both the EC and its member states, and possible implementation of a Community-wide environmental impact assessment program. These types of activities—research, information dissemination, and environmental impact assessments—could form the basis of a unified European environmental law and policy.

is open to countries which are not members of the European Communities but which share the concern of the Communities and the Member States for the objectives of the Agency under agreements concluded between them and the Community following the procedure in Article 228 of the Treaty." *Id.* at art. 19.

⁴⁵ See *EC Commission Proposes Research Program to Perfect Environmental Analysis Methods*, 10 Int'l Env't Rep. (BNA) 610 (Nov. 11, 1987) [hereinafter *EC Commission Proposes Research Program*].

⁴⁶ The Commission recommended that the new EEA should have only modest duties, limited influence, and no oversight authority. *Plan for European Environment Agency, Other EC Proposals Criticized by Group*, 12 Int'l Env't Rep. (BNA) 423 (Sept. 13, 1989) (criticizing the proposed EEA for its lack of "substantive legal or financial instruments for implementation"). See also *Delors Sees European Environment Agency, with Inspectors, but Timetable in Question*, 12 Int'l Env't Rep. (BNA) 287 (June 14, 1989) [hereinafter *European Environment Agency, with Inspectors*]. Conversely, the Parliament rebuffed the Commission's advocacy of a weak role for the EEA and called for a greater EC role in monitoring environmental affairs and enforcing EC environmental laws. Parliament Resolution on the European Environment Agency, O.J. L96/113 (1990); *Parliament Calls for Stronger Role for Proposed European Environment Agency*, 13 Int'l Env't Rep. (BNA) 43 (Feb. 14, 1990). The Parliament, for example, advocates granting wider powers to the EEA, such as the establishment of an environmental inspectorate to enforce EC legislation. Resolution of July 1990 on Institutional Reforms (No. 83-166), at paras. 28-29 (1990).

1. Research Programs

The EC focuses much of its environmental protection efforts on defining and identifying environmental problems. Community environmental research programs are an integral component of this effort⁴⁷ and continue to receive funding and support from the EC.⁴⁸ Such support encompasses the proposed establishment of an EC environmental research laboratory and accompanying guidelines for research practices.⁴⁹

The research component of the EEA's mission could extend beyond the boundaries of the twelve EC member states. Coordi-

⁴⁷ The First Environmental Action Program expressly created provisions for research projects concerning protection of the environment, which subsequently have been carried forth in the Second, Third, and Fourth Environmental Action Programs. *See generally* First Environmental Action Program, *supra* note 8. The Community established a Multi-annual Research and Training Program, which categorized research projects into those mandating direct action and those mandating indirect action.

⁴⁸ Regulation 1872/84, Council Regulation on Action by the Community relating to the environment, O.J. L176/1 (1984) (appropriating Community funding for specific environmental measures and research and development programs relating to the environment and raw materials at the Community level). To date, only a limited amount of money has been allocated to EC environmental protection, most of which is spent on the research, adoption, and promulgation of EC environmental directives. Inadequate funding at the EC level has undoubtedly contributed to a lax EC approach to implementing and enforcing its directives. Funding for EC environmental protection has been generated through a plan known as Action by the Community Relating to the Environment (ACE). Regulation 2242/87, Council Regulation on the Action by the Community Relating to the Environment, O.J. L207/8 (1987). *See also* COMMISSION OF THE EUROPEAN COMMUNITIES ENVIRONMENTAL RESEARCH NEWSLETTER, No. 3, at 20 (Feb. 1989). The EC will need to allocate more funding through this and similar plans to buttress its role as a significant overseer of environmental policy.

⁴⁹ To promote systematic research of environmental problems on a Community level, the Parliament proposed establishment of a Community environmental research laboratory. *European Parliament Proposes Conversion of Nuclear Lab to Environmental Research*, 11 Int'l Env't Rep. (BNA) 233 (Apr. 13, 1988). The Council was expected to follow by adopting guidelines in late 1990 for the regulation of laboratory research practices. *Permanent Representatives Committee Agrees to Adopt Laboratory Guidelines*, 12 Int'l Env't Rep. (BNA) 381 (Aug. 9, 1989). These guidelines would strive to identify and establish dependable and consistent monitoring mechanisms throughout the Community for environmental problems. Some member states, however, are concerned that the adoption of a Community research program will infringe on their sovereignty by assigning increased power and authority to the Community. The Commission, however, proposes to extend its current five-year environmental research program in an effort to push for a Community approach to environmental issues. *Spending Hike for Environment Proposed*, 12 Int'l Env't Rep. (BNA) 416 (Aug. 9, 1989). This extended program will cost an additional 2.3 billion dollars (U.S.) over the 5.4 billion dollars already budgeted for the 1990-1994 period. In addition, the Commission strongly advocates that environmental action "be taken on an all-European, rather than a national, basis" by increasing funding for Community environmental research and protection.

nation and standardization of environmental research processes do not pose an economic threat to non-EC nations. Rather these processes would enable non-EC nations, at least at this early stage, to take advantage of the expansion of EC environmental law and policy. EFTA ministers have already stressed the importance of "full and equal participation in the areas of research and development . . . as well as in the European Environment Agency."⁵⁰

2. Freedom of Access to Environmental Information

Unlike the situation in the United States, information regarding environmental conditions and governmental activities affecting the environment is not readily available in most European nations.⁵¹ The Council, however, has adopted Directive 90/313 to ensure the availability and free exchange of environmental information throughout the Community.⁵² This directive mandates free public access to all environmental information held by public authorities⁵³ and strictly limits the prerogative of member states to deny access to such information.⁵⁴

This directive may become a cornerstone for a unified European environmental program because it reflects the importance of providing free access to environmental information in developing environmental law and policy. Certainly, the success of

⁵⁰ Joint Declaration on EES, *supra* note 17, at 4, para. 11.

⁵¹ Hungary has recognized and drafted a data protection and freedom of information law. *Data Protection and Freedom of Information: The End of the Era in Which the Citizen Is Defenseless; A Law with the Force of the Constitution Is Being Prepared*, Nepszabadsag [in Hungarian], Apr. 26, 1990, at 4 (interview with Dr. Lajos Varga and Dr. Pal Kon yues Toth, organizers of a 1990 scientific conference on personal information management held in Budapest), *trans. in* JOINT PUBLICATION RESEARCH SERVICE—EASTERN EUROPE, June 12, 1990, at 16–17.

⁵² Directive 90/313, Council Directive of 7 June 1990 on Freedom of Access to Information on the Environment, O.J. L158/56 (1990). *See also* *Ministers Accept New Rules Guaranteeing Public Access to Environmental Information*, 13 Int'l Env't Rep. (BNA) 159 (Apr. 11, 1990); *Directive on Access to Information on June Agenda for Council, EEB Head Says*, 12 Int'l Env't Rep. (BNA) 159, 159–60 (Apr. 12, 1989); *European Commission Adopts Directive on Environmental Freedom of Information*, 11 Int'l Env't Rep. (BNA) 585 (Nov. 9, 1988); *Commission Starts Information Network to Boost Clean, Low-Waste Technologies*, 11 Int'l Env't Rep. (BNA) 233 (Apr. 13, 1988). On March 21, 1988, the Commission launched an environmental information network, the Network for Environmental Technology Transfer, with the goal of assisting member states in information exchanges on clean- and low-waste technologies.

⁵³ *Council Directive on Access to Information*, *supra* note 52, at art. 1.

⁵⁴ *Id.* at art. 3. Under article 3, the public may be restricted from access to environmental data related to trade and industrial confidentiality.

unified European environmental law and policy depends on the availability and free exchange of environmental information.

3. Environmental Impact Assessment

Directive 85/337 concerning environmental impact assessments of significant public and private projects stresses that comprehensive environmental law and policy must aim to prevent environmental pollution and nuisances. Assessment of the environmental impacts of these projects will aid European legal integration by forcing consideration of potential environmental harm in the early phases of planning and decision-making.⁵⁵ The individual member states control the implementation, oversight, and enforcement of this directive.⁵⁶ Regardless of the member states' role, however, the EEA should be the mechanism for ensuring that all projects within the EC and under EC supervision are subject to environmental impact assessments. This procedure and the ensuing role of the EEA would provide for a Community-wide, and potentially, a European-wide implementation of the environmental assessment directive.

As the European region continues to change, economic growth and development must be balanced with concerns for regional environmental protection. A regional environmental impact assessment program would help to track and account for the en-

⁵⁵ Directive 85/337, Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, O.J. L175/40 (1985). The environmental assessment directive followed from the general principles set forth in the First Environmental Action Program. The first of the principles states that "[t]he best environment policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects." First Environmental Action Program, *supra* note 8, at Annex, pt. I, tit. II(1). The second principle is intended to effectuate the first, stating that

[e]ffects on the environment should be taken into account at the earliest possible stage in all technical planning and decision-making processes. The environment cannot be considered as external surroundings by which man is harassed and assailed; it must be considered as an essential factor in the organization and promotion of human progress. It is therefore necessary to evaluate the effects on the quality of life and on the environment of any measure that is adopted or contemplated at national or Community level and which is liable to affect these factors.

Id. The Second Environmental Action Program, adopted in 1977, specifically identified the need for environmental assessments to carry out the objectives and principles set forth under the First Environmental Action Program. Second Environmental Action Program, *supra* note 8, at Introduction, Annex.

⁵⁶ The general goals of the environmental assessment program are set forth in the directive, with instructions that member states undertake all other phases of the environmental assessment process. See Directive 85/337, *supra* note 55, at art. 2.

vironmental costs of future development projects. Administration of the assessment directive under the auspices of the EEA would effectively promote environmental impact assessments throughout Europe.

B. *European Bank for Reconstruction and Development*

The EC fashioned the newly-created European Bank for Reconstruction and Development (EBRD) as a major source of its financial aid to Central and Eastern European development. The EBRD was created in 1990 as a multilateral development effort to support social, economic, and environmental reforms in Central and Eastern Europe.⁵⁷ The EBRD represents the political and financial commitment of Western Europe to changes in Central and Eastern Europe.⁵⁸

The EC has a powerful influence in the EBRD. The creators of the bank include a unique group of nations and organizations totalling 44 charter members, with both the EC and the European Investment Bank, an institution of the EC, having membership

⁵⁷ D. Mulford, Statement Before the Subcommittee on International Economic Policy, Trade, Oceans and the Environment of the Senate Foreign Relations Committee, at 1-2 (Mar. 22, 1990). The establishment of a European Bank for Reconstruction and Development (EBRD) was one of the initiatives of the Poland/Hungary Assistance for Economic Restructuring (PHARE) program. This assistance program was created under the auspices of the Organization for Economic Cooperation and Development (OECD), targeting environmental protection for assistance. The EC Commission was designated as coordinator of the program.

For a discussion of the impact of the PHARE program on Poland, see *Poland and the Common Market*, Zycie Gospodarcze [in Polish], Apr. 15, 1990, at 13 (interview with Hans Glaubitz, representative for the Common Market Commission in Warsaw), *trans. in* JOINT PUBLICATION RESEARCH SERVICE—EASTERN EUROPE, June 21, 1990, at 29-30.

For suggestions as to the elements of EBRD's environmental responsibilities, see D. REED, *THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT: AN ENVIRONMENTAL OPPORTUNITY* (World Wildlife Fund, Oct. 1990).

⁵⁸ In light of the current volatility of the political, economic, social, and environmental affairs of these countries, caused, in part, by the abrupt abolition of communist control, many developed countries are scurrying to establish a presence in Eastern Europe. Associated with this urgency to establish a presence is a medley of diverse financial assistance programs, many of which are targeted at the environment. Hampered by lack of time and expertise in coping with the drastic changes, Eastern European governments nevertheless are compelled to identify to an international forum their political and economic agendas. Several of the more significant multilateral institutions that can assist Eastern European political, economic, and environmental transformation are the International Monetary Fund, the World Bank, the OECD, the Conference on Security and Cooperation in Europe (CSCE), and the EC. See THE ATLANTIC COUNCIL, *STRATEGIES FOR FACILITATING EAST EUROPEAN & SOVIET TRANSFORMATION* 33-40 (1991) (providing a brief overview of the multilateral institutions involved in Eastern European transformation).

in their individual capacities.⁵⁹ The EC holds a 51 percent majority interest in the EBRD, establishing EC control over its policy-making and lending activities.

Although the EBRD is not expected to begin issuing loans until mid-1991, financial assistance will be dedicated to both public and private sector projects, and will include support for infrastructure projects as well as environmental clean-up and restoration projects. The EBRD's enabling legislation includes a mandate for balancing Central and Eastern European environmental problems with concerns for economic development.⁶⁰ Several Western European nations and the EC insisted on this provision, thus establishing environmental protection and sustainable development as direct responsibilities of the EBRD.⁶¹ In short, the EC will utilize the EBRD as a primary mechanism for channeling financial assistance to the emerging democracies of Central and Eastern Europe and promoting the EC environmental program at the European level.⁶²

IV. PROSPECTS FOR UNIFIED EUROPEAN ENVIRONMENTAL LAW

As the nations of Europe increasingly cooperate under the auspices of the EC, environmental protection will be catapulted to the forefront of a united Europe's policy agenda. In an effort

⁵⁹ *Regulation, Economics and Law*, DER No. 69, BNA, Apr. 10, 1990 (NEXIS, Current file). Charter members of the Bank include the 24 members of the OECD, Cyprus, Malta, Egypt, Israel, Liechtenstein, Morocco, South Korea, Mexico, Bulgaria, Czechoslovakia, Hungary, Poland, Romania, the Soviet Union, the EC Commission (representing the EC), and the European Investment Bank. D. REED, *supra* note 57, at 10.

⁶⁰ D. REED, *supra* note 57, at 13, 20-21.

⁶¹ Environmental provisions are explicitly included in the Bank's Charter and the Functions, Operations, and Reporting Provisions of its operating guidelines. D. Mulford, *supra* note 57, at 4. The language of the Charter, however, is general, allowing flexibility for later interpretations of specific provisions.

Most multilateral development banks ignore environmental concerns in their enabling statutes and documents, and consider environmental impacts of proposed projects only as an afterthought in their lending processes.

⁶² Even though the individual EC member states bear most of the funding responsibility, the Community has been taking a greater role in financing environmental measures through regulations and its own structural funds, such as the European Social Fund, the European Regional Development Fund, and the Guidance Section of the European Agricultural Guidance and Guarantee Fund. The Envireg Program, a Community initiative established to protect the environment and promote economic development, has been allocated ECU 500 million for environmental protection projects at the regional level for a three-year period. Guidelines Established by the Commission, O.J. C115/3 (1990). Financing measures are also available through regional funds under paragraph 2 of article 130r of the EEC Treaty, which extends environmental protection to other Community policies. EEC Treaty, *supra* note 7, at 130r.

to move closer to integration with the EC, Central and Eastern European governments are "anxious to bring their environmental legislation and practice into line with EC guidelines."⁶³ Similarly, the EFTA nations have strong domestic interests in environmental protection. Given that EFTA environmental standards are generally higher than EC standards, however, it is not clear whether EFTA nations will agree to the lower EC compliance level.

Ultimately, all European nations should adopt environmental laws and policies which complement the needs and desires of a united Europe. Accomplishment of this task, however, will not be easy, and it will not be achieved in the near future. Although the nations of Europe have many incentives for integration, these nations are extremely diverse. A successfully integrated European environmental law and policy must overcome intense cultural, economic, and governmental diversity.

The EES should be specifically targeted as a mechanism for conveying and enforcing EC environmental standards throughout Europe. This process would immediately subject the EFTA and participating Central and Eastern European nations to environmental requirements that parallel or equal those of the EC, making later accession by these nations a less formidable task.

The EES should develop the institutional mechanisms necessary to carry out such an environmental mandate. With final agreement on the EES expected by January 1, 1993, details as to the amount of non-EC involvement and participation in the decision-making process on policy and legislative levels remain unresolved. One of the major points of contention in the EES negotiations remains environmental regulation. The EC would prefer that all goods freely circulate throughout the EES in compliance with EC environmental protection standards.⁶⁴ The EFTA nations, however, argue that they should be allowed to maintain restrictions on products that do not meet their own more stringent standards. Thus, without effective institutions, the EES may prove to be little more than a one foot in, one foot out approach that may, in the long term, thwart European integration.

The EC has positioned itself as the mechanism for overcoming this diversity. The EC and its individual member states have a

⁶³ Dempsey, *Eastern Europe Lacks Incentives*, *Fin. Times*, Mar. 13, 1991, at 2, col. 5.

⁶⁴ *EC-EFTA Talks on European Economic Area Fail to Resolve All Single-Market Issues*, 13 *Int'l Trade Rep.* (BNA) 1626, 1627 (Oct. 24, 1990).

strong commitment to environmental protection. EC environmental law and policy could expand throughout the region as, first, environmental protection within the EC becomes more centralized and coordinated, and second, as the EC begins to intensify relations with non-EC European nations.

In its attempt to unify European environmental law and policy, the EC has undertaken several interim mechanisms to expand its influence over environmental issues. Establishing the EEA and the EBRD are significant first steps in this expansion. The EEA and the EBRD could develop into complex institutions with comprehensive oversight and administrative authority for EC environmental law and policy. Ultimately, the EEA's tasks should expand beyond research, information monitoring, and environmental impact assessments to include implementation and enforcement of EC environmental standards. Vesting these responsibilities in the EEA would centralize European-wide application of EC environmental law and policy. Similarly, EC influence could ensure that the EBRD will incorporate environmental provisions into all levels of its activities.

While these goals may seem lofty, the EC could approach expansion of its environmental agenda in a calculated and meticulous manner. First, the EC should allow non-EC nations to participate in developing European environmental law and policy.⁶⁵ Second, the EC should give substantial financial assistance for environmental protection to Central and Eastern European development. This financial assistance should include specific procedural provisions, and funds earmarked for environmental protection and restoration.

Third, the EC should negotiate environmental protocols to its current bilateral cooperation agreements with non-EC nations. At a minimum, these protocols should call for the establishment of joint research and monitoring programs, free access to environmental information, and preparation of environmental impact assessments.

CONCLUSION

The EC, EFTA, and Central and Eastern European nations have identified the environment as a common problem and are seeking common solutions. The development of EC environmen-

⁶⁵ Thus, Berlin, a symbol of East-West unity, should be named to host the new EEA.

tal law and its expanding influence over environmental affairs throughout Europe has fostered the recognition of the need for a unified European environmental law and policy. Although the EC will continue to have a prominent role in this process, all European nations must act together to reallocate resources, technology, and cultural understanding in order to enter the next stage of European-wide environmental protection—namely, harmonization, compliance, and enforcement.